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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

In re H.E., a Person Coming Under the  
Juvenile Court Law.

MARIN COUNTY HEALTH AND  
HUMAN SERVICES,

Plaintiff and Respondent,

v.

L.E.,

Defendant and Appellant.

A155144

(Marin County  
Super. Ct. No. JV26507A)

L.E. (Mother) appeals from the juvenile court's order terminating her parental rights to her daughter H.E. (Minor). Mother contends the juvenile court erred in finding the beneficial parental relationship exception of Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i),<sup>1</sup> did not apply. Finding no error, we affirm.

**BACKGROUND**

*Proceedings Leading to the Setting of the Section 366.26 Hearing*

In August 2016, Mother gave birth to Minor under a bridge. Mother was homeless, and, soon after giving birth, she tested positive for amphetamine and methamphetamine. The Solano County Health and Social Services filed a dependency

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code.

petition for Minor, Mother did not contest jurisdiction, and Minor was declared a dependent of the court.

In July 2017, the Solano County juvenile court returned Minor to Mother's care, ordered family maintenance services, and transferred the case to Marin County. Marin County accepted the transfer, and the Marin County Health and Human Services (Department) filed an updated case plan. At that time, Mother was living in transitional housing with Minor, and she agreed to the new case plan.

Soon after the case was transferred, however, Mother relapsed, and she was asked to leave her transitional housing.

In September 2017, the Department filed a section 387 supplemental petition, and the juvenile court ordered Minor detained. The Department recommended no reunification services for Mother because Minor was under three years old, Mother had been provided over eight months of services, and there was no substantial probability of reunification within the statutory timeframe. The Department recommended setting a section 366.26 hearing.

In March 2018, the juvenile court held a contested hearing on the Department's section 387 petition. The court determined that returning Minor to Mother would create a substantial risk of harm. The court found Mother's substance abuse was a long-standing issue and her relapse was not an isolated incident. The court was concerned that Mother did not act to protect Minor when she relapsed and that her relapse caused her to lose her housing. The court had little confidence Mother could maintain her sobriety for an extended period given her long history of abuse and the fact that she relapsed within the structured setting of transitional housing. The court also noted that Mother failed to drug test as required by her case plan, which could have provided objective evidence of her claim of continuing sobriety.

The juvenile court terminated family reunification services and set a hearing under section 366.26.<sup>2</sup>

*Section 366.26 Report*

In a report filed May 24, 2018, the Department recommended Mother's parental rights be terminated with adoption as Minor's permanent plan. Minor, who was 23 months old, had lived with the same foster parents (who were also her prospective adoptive parents and whom the Department refers to as the "Resource Parents") from the time she was released from the hospital after birth to the present except for a two-month period when she was returned to the care of Mother. Minor knew the Resource Parents as her mom and dad. She was described by a social worker as a "beautiful little girl who is thriving in her current home." The Resource Parents expressed a strong desire and commitment to adopt Minor. They had completed a home study and were approved as an adoptive home, and they viewed Minor as part of their family already.

The Department reported that Mother's visits with Minor generally went well. From detention in August 2016 through disposition in January 2017, Mother had 12 visits with Minor, during which Mother interacted well with Minor and was attentive to her needs. From disposition through the six-month review hearing in July 2017, Mother did not miss any visits. Mother was attentive to Minor and able to meet her needs during supervised visits, and Mother progressed to longer unsupervised visits. Minor was returned to Mother's care briefly but was detained again in September 2017. From the second detention through the second disposition in March 2018, Mother missed only one visit, which she had to cancel at the last minute. "For the most part," the Department reported, Mother changed Minor's diaper when needed, fed her when she was hungry, and soothed her when she was upset, and there were "no major concerns during the visits." In a December 2017 visit, a social worker noted that Minor did not smile often

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<sup>2</sup> The preceding facts are taken from our previous opinion in this matter, *L.E. v. Superior Court* (June 5, 2018, A153894) [nonpub. opn.], where we denied Mother's writ petition challenging the juvenile court's orders removing Minor and terminating family reunification services.

during her visits and did not show much interest in Mother. In a February 2018 visit, Minor's diaper was not changed. From disposition to the present (May 2018), Mother's visits continued to go well; Mother "continue[d] to meet [Minor]'s needs, engage[d] her in play, and respond[ed] to her needs appropriately."

Under the heading "Assessment/Evaluation," the Department wrote: "[Mother] has a long history of substance abuse and most likely suffers from an undiagnosed mental health issue. [Mother] was provided with over six months of Family Reunification Services and did demonstrate a period of sobriety. Unfortunately, [Mother] was not able to maintain that sobriety and had a relapse within three months of being the primary caregiver for [Minor], resulting in a second removal. Clearly [Mother] loves her daughter, but unfortunately, she has a long history of substance abuse, which has impaired her ability to meet any of the child[]'s basic ongoing needs.

"[Minor] is a young child who deserves and needs a stable, consistent, and safe home. The Resource Parents have demonstrated that they are able to provide such a home to [Minor]. [Minor] refers to her Resource Parents as mommy and papa, and the other child in the home as her sister . . . . The Resource Parents have been her primary caregivers since she was two days old. [Minor] is thriving in their care and has the added benefit of being placed in a prospective adoptive home that values birth family connections. The Resource Parents are committed to maintain familial ties and have demonstrated this by building relationships with both the maternal grandmother and the paternal aunt. They are also supportive of [Mother] remaining a part of [Minor]'s life in some capacity and value maintaining sibling relationships. The termination of parental rights is not detrimental to [Minor], and in fact is in her best interest as it allows her to be adopted and have the benefit of growing up in a stable and loving home."

#### *Addendum Report*

In an addendum report filed July 18, 2018, the Department continued to recommend termination of Mother's parental rights and adoption as Minor's permanent plan. The Department wrote that Minor was "clearly well cared for and very loved by

her Resource Family.” Minor was “observed to be very affectionate with her Resource Family by spontaneously hugging them and snuggling with them.”

Mother’s visits with Minor continued to go well. It was reported that Minor at times appeared shy or withdrawn at the beginning of visits, but she would perk up when Mother engaged with her. Mother was observed playing with Minor, bringing or buying her food, taking her on train rides and sometimes watching shows or listening to music on her iPad, and Mother and Minor were physically affectionate with one another.

Under the heading “Assessment/Evaluation,” the Department wrote: “Throughout the dependency case, [Mother] has been fairly consistent with visiting [Minor], and has been observed to be loving and attentive to [Minor] during supervised visits. While [Minor] appears to enjoy her visits with her mother, the relationship between [Minor and Mother] is not parental in nature. [Mother] has not been the primary caregiver to [Minor] for the majority of her life. The relationship between [Mother] and [Minor] is not so strong that terminating the parental rights of [Mother] would be detrimental to [Minor].”

#### *Section 366.26 Hearing*

On August 2, 2018, the juvenile court held a contested section 366.26 hearing.

Mother offered evidence of notes of Mother’s supervised visitation with Minor from April to July 2018. The notes showed that, on April 9, Minor gave Mother a kiss and was very excited during the visit and, on April 16, Minor was withdrawn at the beginning of the visit, but once she saw Mother, “she began to be happy and not so shy.” Nothing indicated Minor was unhappy at the visits. Asked about a visit Mother had with Minor in July, the social worker who prepared the Department’s section 366.26 report testified that Minor “enjoys her mother” and “enjoyed the visit.”

Mother testified on her own behalf. She had been living at the same residence in Vallejo since December 2017. She had changed jobs and was starting training in car sales that week. Mother had maintained her sobriety since her last appearance in court (the contested hearing in March 2018). Asked about her visits with Minor, Mother testified: “We have a really, really great time together. Our bond has never been jeopardized, for lack of a better word. We have fun. Not every visit is the same, but

they're consistent in the things that we do. We always have a snack, we always watch—either read or watch her—one of her shows on her iPad that I have for her. We'll go for a walk, we'll have some play time, things like the merry-go-round, the train. If there's a jungle gym available, that. And just kind of like being playful with one another. Our visits are really great and kind of amazing to me, considering the time that we have to spend together.” Minor was never fussy during visits, and when anyone referred to Mother as “Mommy,” Minor would respond with understanding.<sup>3</sup>

Mother wanted Minor returned to her. Asked why, Mother responded: “I know that I'm a great influence to and for her. I believe that I have a lot to learn from her and her from me. And, you know, as long as she would be with me, she would definitely be surrounded by people who love her and who are supportive of her and of myself and of what I'm doing for her and for us.”

Counsel for the Department took the position Minor was adoptable and, therefore, parental rights should be terminated. Anticipating Mother would raise the beneficial parental relationship exception to avoid termination of parental rights, Department counsel conceded that Mother met the first prong of the exception by maintaining regular contact and visitation, but asserted Mother did not meet the second prong. She pointed out that Minor spent the majority of her life outside Mother's care and, although Mother's visits with Minor were appropriate and “cheerful,” “[t]here's no evidence that the parent-child relationship outweigh[ed] the benefits of adoption” in this case.

Minor's counsel agreed with the Department. Her counsel added that Minor was “friendly and appropriate with numerous people, not just the mother in the visits,” but Mother's friendly and consistent visits were not enough to overcome the benefit of permanence that the Minor deserved.

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<sup>3</sup> Mother testified, “I notice that [Minor] doesn't call me anything right now. When she does call me something, it's usually Mommy.”

Mother's counsel argued Minor clearly had an attachment to Mother, it would be a significant loss to Minor to lose that relationship, and "it would be very detrimental to her to have that attachment severed by terminating [Mother's] parental rights."

### *Decision*

The juvenile court found Minor was likely to be adopted by clear and convincing evidence. The court then addressed Mother's claim for application of the beneficial parental relationship exception: "[T]he exception . . . as argued . . . is that there is a benefit of maintaining a relationship with the parent. [¶] That's only half of the exception. The benefit of maintaining a relationship with the parent must outweigh the benefits of the adoption. So I can't just look at whether it's beneficial to [Minor] to maintain a relationship. I have to say: That benefit outweighs the benefit of adoption. And I think that Minor's counsel argued that permanency for this very young child is of utmost importance to her and outweighs any benefit that [Minor] would have to maintain her relationship with Mother."

The juvenile court determined that the benefit of Minor maintaining a relationship with Mother did not outweigh the benefits of adoption, and terminated Mother's parental rights.

## **DISCUSSION**

Mother's sole contention on appeal is that the juvenile court erred in failing to find that she had established the beneficial parental relationship exception to adoption.

At a section 366.26 hearing, the juvenile court must select and implement a permanent plan for the dependent child. Where there is no probability of reunification with a parent, the preferred plan is adoption. (*In re K.P.* (2012) 203 Cal.App.4th 614, 620.) "If the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).)<sup>4</sup>

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<sup>4</sup> Mother does not challenge the juvenile court's finding that Minor was adoptable within the meaning of section 366.26, subdivision (c)(1).

Section 366.26, subdivision (c)(1)(B) sets forth exceptions to the preference for adoption if the court finds a “compelling reason” that termination of parental rights would be detrimental to the child. Under the beneficial parental relationship exception, a parent must establish two prongs: first, “[t]he parents have maintained regular visitation and contact with the child” and, second “the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); *In re Fernando M.* (2006) 138 Cal.App.4th 529, 534 [it is the parent’s burden to show the applicability of a statutory exception to adoption].)

“The ‘benefit’ prong of the exception requires the parent to prove his or her relationship with the child ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an ‘emotional bond’ with the child, ‘the parents must show that they occupy “a parental role” in the child’s life.’ [Citations.] The relationship that gives rise to this exception to the statutory preference for adoption ‘characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.’ [Citation.] Moreover, ‘[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.’ ” (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621.)

“The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs. [Citation.] While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that the child would suffer detriment from its termination. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.)



California courts are divided as to the correct standard of review of an order denying the applicability of an exception to termination of parental rights. Most courts have reviewed such an order for substantial evidence. (See, e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 & fn.4.) The abuse of discretion standard has also been applied. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Still other cases have blended these approaches based on the view that the beneficial parental relationship exception involves making two determinations, a factual one and a discretionary one. The first, whether a beneficial relationship exists, is a factual determination properly reviewed for substantial evidence. The second, whether that relationship constitutes “a compelling reason for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B)), requires the juvenile court to “ ‘determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,’ ” and is appropriately reviewed for abuse of discretion. (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We will apply this standard.

Mother argues in her opening brief that the evidence of her visits with Minor, during which Minor visibly brightened in Mother’s presence, was substantial evidence of a substantial positive emotional attachment such that severing the parental relationship would harm Minor. Even assuming for the purposes of argument that substantial evidence required a factual finding that a beneficial relationship exists between Mother and Minor, we review for abuse of discretion the juvenile court’s determination whether the benefit of preserving that relationship outweighs the benefit of the permanence and stability provided by adoption. (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 622.)

Here, Minor is very young and just shy of two years old at the time of the hearing. She has spent almost all of her young life with the Resource Parents, having lived with them from the time she left the hospital until the present, except for a brief period (less than three months) in 2017 when she was in Mother’s care and Mother relapsed. Minor refers to her Resource Parents as “mommy and papa,” refers to their daughter as her

sister, and is very affectionate with the family, “spontaneously hugging them and snuggling with them.” The Resource Parents are committed to adopting Minor, and she is “thriving” in their home. Minor’s counsel advocated that Minor’s relationship with Mother did not overcome the benefit of permanency that could be provided by adoption. Under these circumstances, the juvenile court did not abuse its discretion in determining that the benefit of maintaining a relationship with Mother did not outweigh the benefit Minor would gain from adoption.

#### **DISPOSITION**

The order terminating Mother’s parental rights is affirmed.

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Miller, J.

We concur:

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Kline, P.J.

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Stewart, J.

A155144, *Marin County Health & Human Services v.L.E.*